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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No. 456

CLAUDE C. LONG,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California
and
BRIEF IN SUPPORT THEREOF.

EDWARD A. CUNHA,
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No.

CLAUDE C. LONG,
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THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The petition of Claude C. Long for a Writ of Certiorari to the Supreme Court of the State of California, respectfully shows to Your Honors:

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The federal question presented: Is the denial to the accused in a criminal case of the right to prove his

innocence a deprivation of the due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment?

We adopt, for the purpose of this petition, the following excerpts from the opinion of the State Court, *People v. Long,* 103 Pac. (2d) 969:

> "Appellant, Dr. Claude C. Long, his wife, and one Ann Fisher, were charged with the murder of Genevieve Arganbright. Admittedly the death occurred while Dr. Long was performing an abortion upon the deceased. The jury acquitted Mrs. Long and Ann Fisher, but found Dr. Long guilty of manslaughter * * *" (Appendix, page 1.)
>
> "* * * **The main theory of the defense was that the operation was necessary to preserve the life of the deceased;** that the deceased had an ailing heart resulting from a mitral stenosis; that this heart might decompensate at any time; that this heart could not stand the burdens of full pregnancy and of childbirth; that the interruption of the pregnancy was necessary to preserve her life; that the operation was performed with due caution and circumspection; that Mrs. Arganbright died from the heart condition." (Appendix, page 8.)
>
> **"There can be no doubt that the deceased was suffering from a heart affected with a mitral stenosis**—that is, the mitral valve of the heart had become calcified so as to reduce the diameter of the orifice of the valve. The medical witnesses testified that this condition as it progresses results in the blood's passing through the valve with increased difficulty. As a result, the heart must pump harder and faster, and to do this becomes enlarged. The heart becomes decompensated when

it is unable to meet the increased load. When this condition occurs, death ensues. They also testified that there are various visual symptoms of a decompensating heart, such as shortness of breath and discoloration. One of the main questions involved at the trial was whether the heart condition of deceased had progressed sufficiently so that the added burdens of pregnancy and childbirth might cause the heart to decompensate.

"In support of his defense, Dr. Long testified that the deceased first visited him in March of 1937; that he had then examined her and found she had a mitral stenosis; that her heart was a border-line heart; that the compensation was fairly good, but decompensation might occur at any time; that he was not sure at that time she was pregnant; that he formed the opinion at that time that if she were pregnant an abortion was necessary to preserve her life; * * *

"It is true that there was considerable expert testimony offered by appellant in addition to his own testimony to the effect that an abortion was reasonably required in the instant case. After laying the proper foundation, portions of various medical books were read into evidence, their general tenor being that some doctors recommend abortions in all cases of mitral stenosis. It also appeared that in November, 1933, deceased visited the Mt. Zion Hospital Clinic. At that time she apparently believed that she was pregnant. **Her symptoms were then such that, coupled with the doctors' clinical examination then made of her heart, they testified that, had she been then pregnant, they would have recommended an abortion.** It was later discovered she was not then pregnant, so that no abortion was required."

Following his conviction, petitioner appealed to the District Court of Appeal of the State of California for the First Appellate District, which reversed the judgment because the trial court gave the following instruction to the jury on the subject of expert testimony:

> "(1) Duly qualified experts may give their opinions on questions in controversy at a trial to assist the jury in deciding such questions. The jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable.
>
> "(2) You are instructed that in considering the expert testimony which has been offered in this case, you should weigh it with all the other evidence in the case; you are not bound to determine any fact in accordance with the opinion of such expert, if not convincing to your mind.
>
> "(3) You are instructed that you may regard the testimony of an expert as merely **advisory,** and you are instructed that **you may disregard altogether the testimony of such expert,** and you may **form your own conclusions** from all the evidence submitted to you.
>
> "(4) After considering all these things, and any other circumstances in evidence, you are to give such testimony such weight as you, in your judgment, think it is entitled to, and if convincing and carrying with it a belief in its truth, act upon it; if not, you may and you have a right to reject it."

The District Court of Appeal says of this instruction:

> "It contains almost identical language to that held to be erroneous in Hirshfeld v. Dana, 193 Cal. 142 (223 Pac. 451), and to be reversible error in Pearson v. Crabtree, 70 Cal. App. 52 (232 Pac. 715). We could add nothing to what was said concerning this instruction in these two cases. Whatever may be the value of expert testimony in some cases, in this case, the question of the presence or absence of due caution and circumspection, in the nature of things, could be largely proved or disproved only by expert testimony—**it was the only means open to defendant in presenting his defense.**"

Exercising the power conferred upon it by the Constitution of the State of California (Section 4c, Article VI), the Supreme Court of the State of California granted a petition of the Attorney General for a hearing after judgment in the District Court of Appeal, and thereafter in a *per curiam* opinion, affirmed the judgment. Mr. Justice Carter, in a lengthy dissenting opinion, **held that the giving of the instruction constituted a deprivation of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.** (Appendix, page 32.)

STATEMENT PARTICULARLY DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

(a) The statutory provision believed to sustain the jurisdiction is Section 237 of the Judicial Code; U. S. C. A. Title 28, Section 344, Subdivision b.

(b) The date of the judgment of the Supreme Court of California sought to be reviewed—June 27, 1940; rehearing denied—July 25, 1940.

That the nature of the case and the rulings of the Court were such as to bring the case within the jurisdictional provisions relied upon, is apparent from the language heretofore quoted from the majority opinion of the Supreme Court of California, the dissenting opinion of Mr. Justice Carter, and the opinion of the District Court of Appeal. To comply with the requirements of Rule 12 (Par. 1) of this Court as we construe the same, we append hereto copies of the opinion of the State Court delivered upon the rendering of the judgment sought to be reviewed, with the earlier opinions in the same case, to-wit, the original opinion of the District Court of Appeal and its opinion denying a rehearing.

The cases believed to sustain the jurisdiction are, in part, as follows:

Keerl v. Montana, 213 U. S. 135, 29 S. Ct. 469, 53 L. ed. 634;

Chicago B. & Q. R. Co. v. Chicago, 166 U. S. 226, 241, 17 S. Ct. 581, 41 L. ed. 979, 986;

Hebert v. Louisiana, 272 U. S. 312, 316, 71 L. ed. 270, 272, 47 S. Ct. 103, 48 A. L. R. 1102;

Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340, 79 L. ed. 791, 98 A. L. R. 406;

Moore v. Dempsey, 261 U. S. 86, 67 L. ed. 543, 43 S. Ct. 265;

Tumey v. Ohio, 273 U. S. 510, 71 L. ed. 749, 47 S. Ct. 437, 50 A. L. R. 1243;

Holden v. Hardy, 169 U. S. 366, 389, 42 L. ed. 780, 18 S. Ct. 383;
Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 84 A. L. R. 527.

STATEMENT OF THE GROUNDS UPON WHICH IT IS CONTENDED THE QUESTIONS INVOLVED ARE SUBSTANTIAL.

The instruction given by the trial court, heretofore quoted, deprived the petitioner, as pointed out in the opinion of the District Court of Appeal, of the only evidence by which he could prove his defense that the operation was necessary to preserve life, this defense being one which could be proven by expert testimony only.

The trial court, by leaving it to the caprice of the jury to disregard expert testimony, deprived petitioner of his right to due process of law. The courts of California and, so far as we are advised, of every other jurisdiction, have applied in civil cases the rule that the necessity and propriety of medical and surgical treatment are, except in a very limited class of cases of which this is not one, questions that can be determined by expert testimony alone; and the Supreme Court of California, by applying a different rule in criminal cases, has deprived petitioner of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

These questions, we submit, are substantial.

THE STAGE OF THE PROCEEDINGS AND THE MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED.

The instruction of the trial court heretofore quoted appears in Volume II of the typewritten record, page 1389, line 16 to page 1390, line 8, inclusive. This instruction was given by the Court on its own motion and is the first appearance of the federal question in the record. The California statute (Penal Code Section 1176) provides that "when the charge of the court has been taken down by a reporter, the questions presented in such instructions or charge need not be excepted to or embodied in a bill of exceptions * * * and any error in the action of the court thereon may be reviewed on appeal in like manner as if presented in a bill of exceptions".

On the motion for new trial, the federal question was raised. (Reporter's Transcript Vol. II, page 1429.) That the contention that the instruction constituted a deprivation of due process of law and of the equal protection of the laws was raised both in the briefs filed in the District Court of Appeal and in the petition for a rehearing presented to and denied by the Supreme Court of the State of California, appears from the certificate of Chief Justice Gibson, the last document in Vol. II of the record. As the briefs are no part of the record, and as the opinion of the majority of the Court does not discuss the federal question, it was necessary to resort to such a certificate to show that the federal question was actually presented to, and acted upon, by the State Court. (See *Whitney v. California,* 274 U. S. 357, 47 S. Ct. 241, 71 L. ed. 1095.) Moreover, the federal question is discussed in Justice Carter's dissent. (Appendix, page 32.)

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

The State Court has decided federal questions of substance not heretofore determined by this Court, and has decided them in a way probably not in accord with the applicable decisions of this Court for the reasons heretofore stated of the grounds upon which it is contended the questions involved are substantial, and which need not be repeated.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue out of, and under the seal, of this Honorable Court, directed to the Honorable Justices of the Supreme Court of the State of California, commanding them to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the cause entitled as above, and that the said judgment of the Supreme Court of California may be reviewed by Your Honors and the judgment thereof reversed, and that your petitioner have such other and further relief as to this Honorable Court may seem meet, just, and proper in the premises; and your petitioner will ever pray.

Dated, San Francisco, California,
September 11, 1940.

EDWARD A. CUNHA,
WILLIAM F. HERRON,
JOHN J. TAAFFE,
HERBERT W. ERSKINE,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for the petitioner in the above entitled cause and that, in my judgment, the foregoing petition is well founded in point of law, as well as in fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,
September 11, 1940.

HERBERT W. ERSKINE,
Of Counsel for Petitioner and Member of the Bar of the Supreme Court of the United States.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No.

CLAUDE C. LONG,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

DATE OF JUDGMENT OF TRIAL COURT.

The judgment of the trial court was entered August 21, 1937. (Typewritten Transcript Vol. I, pages 127, 128.)

II.

THE OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of California was rendered June 27, 1940, and is printed

in 103 Pac. (2d) 969, and in the appendix hereto. The opinions of the District Court of Appeal, printed in the appendix at pages 33 *et seq.* and 59 *et seq.*, are reported in 96 Pac. (2d) 354 and 96 Pac. (2d) 1021 respectively.

III.

DATE OF JUDGMENT OF APPELLATE COURT.

The judgment of the Supreme Court of the State of California affirming the judgment of the lower court was entered June 27, 1940. (Transcript of Record, Vol. II, page 1572.)

IV.

THE JURISDICTION.

The statutory provision under which jurisdiction is invoked is Section 237 of the Judicial Code; U. S. C. A. Title 28, Section 344, Subdivision b.

V.

STATEMENT OF GROUNDS OF JURISDICTION AND STATEMENT OF THE CASE.

A full statement of the grounds of jurisdiction and of the case has been given under like headings in the petition, and, in the interest of brevity, is not repeated at this point.

VI.

SPECIFICATION OF ERRORS.

The errors are sufficiently specified in the statement of the grounds upon which it is contended the questions involved are substantial, contained in the foregoing petition, and in the summary of argument herein.

VII.

ARGUMENT.

SUMMARY OF ARGUMENT.

(I) WHETHER THE ABORTION PERFORMED BY PETITIONER WAS NECESSARY TO SAVE THE LIFE OF THE DECEASED, WAS A CLINICAL QUESTION WHICH COULD BE SOLVED BY EXPERT TESTIMONY ALONE, AND THEREFORE EXPERT TESTIMONY WAS THE ONLY MEANS BY WHICH PETITIONER COULD ESTABLISH HIS INNOCENCE.

(II) BY GIVING THE INSTRUCTION COMPLAINED OF, THE TRIAL COURT VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW.

(III) THE SUPREME COURT OF CALIFORNIA, BY UPHOLDING THE GIVING OF THE INSTRUCTION, HAS DENIED TO PETITIONER THE EQUAL PROTECTION OF THE LAWS.

(I)

WHETHER THE ABORTION PERFORMED BY PETITIONER WAS NECESSARY TO SAVE THE LIFE OF THE DECEASED, WAS A CLINICAL QUESTION WHICH COULD BE SOLVED BY EXPERT TESTIMONY ALONE, AND THEREFORE EXPERT TESTIMONY WAS THE ONLY MEANS BY WHICH PETITIONER COULD ESTABLISH HIS INNOCENCE.

The California courts have long recognized that the correctness of diagnosis and treatment by a physician and surgeon, the necessity for an operation, and the skill with which the same is performed, are matters which can be proved by expert testimony alone, save in a very limited class of cases, of which this is not one, in which the doctrine of *res ipsa loquitur* can be applied. **"As to what is, or is not, the proper practice, is uniformly a question for experts and can be established only by their testimony."**

Patterson v. Marcus, 203 Cal. 550, 265 Pac. 222.

> "The true rule, as we understand, is this: ordinarily, negligence on the part of a physician or surgeon must be proved by expert evidence, **and when the matter in issue is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert evidence is conclusive."**
>
> *Nicholas v. Jacobson,* 113 Cal. App. 382, 298 Pac. 505.

Other jurisdictions adhere to the same rule:

Brewer v. Ring, 177 N. C. 476, 99 S. E. 358, 364;
Jaeger v. Stratton, 170 Wis. 579, 176 N. W. 61;
Schumacker v. Murray Hospital, 58 Mont. 447, 193 Pac. 397, 403;
Edwards v. Uland, 193 Ind. 376, 140 N. E. 546, 548.

This rule has been applied in cases involving the necessity of performing a therapeutic abortion, and it has been held that the testimony of laymen, or even of the patient herself, is insufficient to even create a conflict.

> "The question whether miscarriage was necessary to have the life of the patient was necessarily, upon this record, a question of medical opinion. * * * We held in the Aiken case (State v. Aiken, 109 Iowa 643, 80 N. W. 1073), that **the diagnosis of a regular physician may not be negatived by that kind of testimony.** If the diagnosis of a regular physician discloses an internal condition of a patent which threatens his life, it may not be negatived by the mere fact that the patient is unconscious of it and feels well, and is apparently well. Fatal conditions are often found in patients who were wholly unsuspecting of their danger."
>
> *State v. Dunklebarger,* 206 Iowa 971, 221 N. W. 592.

(II)

BY GIVING THE INSTRUCTION COMPLAINED OF, THE TRIAL COURT VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW.

Since the testimony of experts was the only evidence by which petitioner could establish his defense that the operation was necessary to preserve life, it follows that the complained of instruction deprived him of his means, and his only means, of establishing his innocence, because the instruction gave the jury the right to disregard testimony which, in such cases is conclusive. This was a deprivation of his right to due process of law, because that right includes not

only the right to citation and notice of a hearing, but the right to present a full defense.

> "The offender must be allowed to offer evidence and argument in his defense, otherwise, any judgment which the Court may pronounce, will be absolutely void."
>
> *McClatchy v. Superior Court,* 119 Cal. 413, 51 Pac. 696, citing:
>
> *Postal Telegraph Co. v. Adams,* 155 U. S. 689, 698;
>
> *Hovey v. Elliott,* 167 U. S. 409;
>
> *Galpin v. Page,* 18 Wall. 350, 21 L. Ed. 959.

> "Can it be doubted that due process of law signifies a right to be heard in one's defense? * * * **It would be like saying to the party 'Appear and you shall be heard'; and, when he has appeared, saying 'Your appearance shall not be recognized, and you shall not be heard'.**"
>
> *Hovey v. Elliott,* supra.

> "This ruling was not mere error. It was a complete denial of a right of trial."
>
> *In re Cunha,* 123 Cal. App. 625, 634, 11 Pac. (2d) 902.

(III)

THE SUPREME COURT OF CALIFORNIA, BY UPHOLDING THE GIVING OF THE INSTRUCTION, HAS DENIED TO PETITIONER THE EQUAL PROTECTION OF THE LAWS.

In his masterful dissenting opinion in this cause, Mr. Justice Carter quotes at length from the earlier

California case of *Pearson v. Crabtree,* 70 Cal. App. 52, 232 Pac. 715, which holds that the giving of the very instruction given in this cause was reversible error. We can do no better in presenting this portion of the argument than to quote from Mr. Justice Carter's dissent:

> "In other words, the principal issue in the trial of this case and the sole foundation stone upon which the defense was based, namely, that the performance of the abortion was necessary to preserve the life of the deceased, was of necessity, and in the very nature of things, predicated solely upon expert testimony. Common sense as well as legal reasoning dictates that no one without expert knowledge and skill in the subjects of anatomy and medical science would be qualified to testify on this subject, and it has been the settled law of this State for decades that when the sole issue in a case is the subject of expert knowledge of medical science, that such issue must be decided solely upon the testimony of those learned in the practice of medicine and surgery. (Perkins v. Trueblood, 180 Cal. 437; Arnold v. Hopkins, 203 Cal. 553; Houghton v. Dickson, 29 Cal. App. 321; Dameron v. Ansboro, 39 Cal. App. 289; Pearson v. Crabtree, 70 Cal. App. 52; William Simpson Construction Company v. Industrial Accident Commission, 74 Cal. App. 239; Ingamells v. Goodfellow, 109 Cal. App. 62; Roberts v. Parker, 121 Cal. App. 264.)
>
> * * * * * * *
>
> "The case of Pearson v. Crabtree, supra, has been uniformly followed in this and other jurisdictions where the common law prevails and is recognized as the settled law of this State.

"There is little doubt, in my opinion, that if the case at bar were a civil action in which a judgment had been recovered by a plaintiff upon the same factual situation as that disclosed by the record in this case, and such an instruction had been given as the one quoted in the majority opinion in this case, the court would have no hesitancy in reversing such a judgment upon the authority of the case of Pearson v. Crabtree, supra, and Hirshfeld v. Dana, 193 Cal. 142, upon the ground that such instruction was prejudicially erroneous and probably resulted in a miscarriage of justice.

"**To hold that the giving of such an instruction as the one given in the case at bar is prejudicial in a civil case and not in a criminal case, is to my mind a holding in effect that life and liberty are of less concern to human beings than property.** I am opposed to any such concept and I firmly believe that the application of the law should be more rigid and more strictly construed in the protection of the lives and liberties of our people than in the protection of their property rights.

"There can be no escape from the conclusion that the jury in the case at bar were plainly told by the trial judge not only that they could regard the testimony of an expert as merely **advisory,** but that they **may disregard altogether the testimony of such expert,** and form their own conclusions from all the evidence submitted to them. To say that such an instruction did not deprive the defendant of the benefit of the expert testimony submitted by both the prosecution and the defense is stating an obvious contradiction. If such an instruction can be cured by the application of section 4½ of article VI of the Constitution, then in

my opinion it must necessarily follow that a defendant in a criminal case is not entitled as a matter of legal right to have the jury instructed on the law applicable to the facts of the case presented to the trial court during the trial of his case and that this section of the Constitution can be resorted to for the purpose of **depriving a person of the equal protection of the law guaranteed by the 14th Amendment to the Constitution of the United States.**" (Apendix, pages 27-32.)

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that to such an end, a writ of certiorari should be granted; that the judgment of the Supreme Court of the State of California should be reversed, and the cause remanded to the State Court with directions that it cause to be done what of right and according to the Constitution, laws and customs of the United States ought to be done.

Dated, San Francisco, California,
September 11, 1940.

EDWARD A. CUNHA,
WILLIAM F. HERRON,
JOHN J. TAAFFE,
HERBERT W. ERSKINE,
Attorneys for Petitioner.

(Appendix Follows.)

Appendix

OPINION OF THE SUPREME COURT OF CALIFORNIA AND DISSENTING OPINION OF JUSTICE CARTER.

(Vol. 100 Cal. Dec. 9.) (103 Pac. (2d) 969.)

BY THE COURT

Appellant herein was charged with having committed the crime of murder. On the trial of the cause the jury found him guilty of the crime of manslaughter, and this appeal was taken from the judgment which thereafter was rendered, as well as from an order denying a motion for a new trial. Following a decision rendered by the District Court of Appeal, a hearing was granted by this court in order that further consideration might be given to the question of prejudice assertedly suffered by defendant as a result of the giving of certain instructions. After a careful review of the entire record, it is the conclusion of this court that with respect to certain of the questions presented by the appeal the decision of the District Court of Appeal rendered on November 29, 1939, is correct. Therefore, that portion of said decision with which this court is in agreement is adopted herein, as follows:

"Appellant Dr. Claude C. Long, his wife, and one Ann Fisher, were charged with the murder of Genevieve Arganbright. Admittedly the death occurred while Dr. Long was performing an abortion upon the

deceased. The jury acquitted Mrs. Long and Ann Fisher, but found Dr. Long guilty of manslaughter. * * *

"Appellant urges three main contentions on this appeal:

"1. That the evidence is insufficient to show either murder or manslaughter; that the cause was tried solely on the theory that the death resulted from an illegal abortion; that there is no evidence to show that the operation was performed without due caution and circumspection; that under such circumstances it was error to instruct on manslaughter; that the conviction for manslaughter constituted an implied acquittal on the murder charge, and constituted a determination that the operation was lawful; that the manslaughter verdict, based on the theory of a lawful operation performed without due caution and circumspection, is totally unsupported by the evidence.

"2. That the trial court erred in the giving of several instructions. * * *

"The evidence shows that Dr. Long, a duly licensed physician, maintained two offices—one on Valencia street and one on Haight street, both in San Francisco. The Valencia street office was in the middle flat of the building, had the doctor's name on the window, and his telephone was listed in the directory. The defendant Fisher, who is related to the Longs, was in charge of this office. When visited by the police, after the homicide, no medical or surgical equipment of any kind was found in this flat. Dr. Long testified that he

seldom saw any patients at this office; that patients called there, or telephoned, and that Mrs. Fisher made appointments for them. The evidence also shows that in the flat above the offices occupied by Long on Valencia street there lived a Mrs. Spence, who was married to Mrs. Long's brother. She testified that defendant Fisher resided at the rear of the offices, and that in the time that she had been living there she had never seen Dr. Long on the premises.

"Doctor Long admittedly used the Haight street premises for seeing and treating his patients. These premises had been rented by Mrs. Long under the name of Young. A telephone was located at these premises under the name of Young, but at the request of the Longs the number was not listed in the telephone directory. The appellant frequently parked his automobile in a garage about seven blocks from the Haight street flat. On occasion the garageman accompanied Long to within a half block of the flat, where Long would get out of the car and the garageman would return the automobile to the garage. When arrested Long had in his possession keys to the back doors of these premises, but none fitted the front door. When visited by the police, after the homicide, an operating table and accessories, and various medicines used in connection with operations on women were found in the flat. Some instruments used in performing abortions were found in a closet, but the actual instruments used by the appellant in performing the abortion on Mrs. Arganbright were admittedly re-

moved by him the night she died and turned over to the police later at the time of his arrest.

"The husband of the deceased testified that his wife was two and one-half months pregnant, was apparently in good health, and that she possessed none of the visual symptoms of a bad heart. He further stated she was athletic and took long hikes, danced, liked to swim and play tennis, and, although she worked for the W. P. A. during the day, performed the usual household tasks. On May 19, 1937, the deceased, in the presence of her husband, telephoned to Dr. Long's Valencia street office and asked the woman who answered the phone for an appointment. She was told to call at that office between two and four o'clock. Mr. and Mrs. Arganbright called that afternoon at the Valencia street office, where they were admitted by defendant Fisher. In the presence of the husband, Fisher asked the deceased her name and questioned her concerning the identity of her companion. The husband was placed in one room and the deceased and Fisher went into another. The husband overheard Fisher ask the deceased how long she had been pregnant, and also heard Fisher tell his wife not to bring her husband along when she returned the next night.

"The next day, May 20, 1937, Mrs. Arganbright went to work and returned home at the usual hour. She left home at about quarter to seven in the evening, telling her husband she was going to have an abortion performed by Dr. Long; that she was going by street car to the Valencia street office, where she

was to be taken by a chauffeur to some place on Haight street. When she left her home she had with her $50 which she had borrowed, which sum Fisher had told her the day before was necessary for the operation.

"Late in the evening of May 20, 1937, Mrs. Arganbright died at the Haight street premises while the appellant was performing an abortion upon her.

"So far as the prosecution's case is concerned, chronologically, the next pertinent testimony was given by Dr. Goldsand. He testified that between 10:20 and 10:30 p. m. he received a telephone call from defendant Fisher; that she asked him to come immediately to the Haight street premises to see a very sick patient; that he arrived in eight or ten minutes; that Fisher admitted him and told him to hurry up the stairs; that he was ushered into a bedroom where he saw Dr. and Mrs. Long and the deceased, who was lying on a bed, attired in her street clothes, her lower extremities being covered with a blanket. The appellant asked Dr. Goldsand to examine the patient. Upon such examination Dr. Goldsand ascertained that Mrs. Arganbright was dead. He administered ephedrin sulphate, but it did not revive the patient. He then told Dr. Long the woman was dead. He testified that Long then asked him to sign the death certificate, but he refused, informing Long that because he was the physician who had attended the deceased during her lifetime, it was his, Long's, duty to sign the death certificate. Long, he stated, remained silent, whereupon he, Goldsand, left the premises. Dr. Long testified

that he understood Dr. Goldsand to state he would sign the certificate. This conflict, in view of the conviction, must be resolved in favor of the prosecution.

"The next link in the prosecution's chain of evidence was furnished by an employee of an undertaking establishment in San Francisco. He testified that he and a fellow employee went to the Haight street flat to get a body in response to a telephone call; that he arrived at about 2:30 a. m. of the morning of May 21st; that he met Mrs. Long and Ann Fisher there; that Dr. Long was not there; that he was informed by the two women that they were not members of the deceased's family but were 'very dear friends'; that the relatives had left and would complete arrangements with the undertaking parlor in the morning; that Dr. Goldsand had been the attending physician and that he had been in attendance for at least half an hour before she passed away; that the deceased had died from a heart attack. In response to an inquiry as to whether there was a telephone in the flat from which he could phone Dr. Goldsand for verification he was told that there was no telephone; that Dr. Goldsand had stated everything was in order and that he would sign the death certificate in the morning. The next morning the body was embalmed, and in the afternoon, when no relatives had called or death certificate had been signed, the matter was referred to the coroner. Both Dr. Goldsand and the employees of the undertaking establishment testified as to the physical appearance of the body. The conditions testified to were

consistent with the defense's theory that the deceased had died from heart failure.

"On the morning of May 21st the appellant and his wife registered at the Chancellor Hotel in San Francisco under the false and assumed names of Mr. and Mrs. C. Young of Sonora, California. At the time they registered they were informed that all rooms had been engaged for that night and that they must give up their room by 4 p. m. They left the Chancellor Hotel before 4 p. m. and went to the Cecil Hotel where they again registered under false and assumed names.

"Late in the afternoon of May 21st the husband of deceased telephoned the Valencia street office of appellant. Defendant Fisher answered the telephone, and told him that she knew nothing of his wife's whereabouts, and that Dr. Long was out of town. Later the police arrived, and he then discovered his wife was dead.

"Dr. and Mrs. Long were arrested at the Cecil Hotel on May 22d. At that time, after telephoning to their attorney, they had changed their registration and were registered under their proper names. Defendant Fisher left San Francisco and was located several weeks later in Nevada City.

"On the trial neither Mrs. Long nor Ann Fisher took the witness stand. Appellant Long did take the stand in his own behalf, and testified in detail concerning the facts and circumstances surrounding the death.

"It was the main theory of the prosecution that Genevieve Arganbright had died as the result of an

illegal abortion; that the abortion was not necessary to preserve her life; that she died as a result of surgical shock and from hemorrhage caused by the abortion; that she did not die as a result of a heart condition. However, although this was the main theory of the prosecution, it was not the only theory. As will later appear in detail, the prosecution from the very first of the trial refused to limit itself to this theory, and offered testimony that the death resulted from an abortion performed without due caution and circumspection. This distinction becomes important because, so far as this case is concerned to constitute murder, an abortion must be an illegal abortion—that is, one not necessary to preserve the life of the woman aborted (sec. 274, Pen. Code), while to constitute manslaughter, an abortion must be a lawful abortion, performed 'without due caution and circumspection'. (Sec. 192, Pen. Code.) The main theory of the defense was that the operation was necessary to preserve the life of the deceased; that the deceased had an ailing heart resulting from a mitral stenosis; that this heart might decompensate at any time; that this heart could not stand the burdens of full pregnancy and of childbirth; that the interruption of the pregnancy was necessary to preserve her life; that the operation was performed with due caution and circumspection; that Mrs. Arganbright died from the heart condition.

"There can be no doubt that the deceased was suffering from a heart affected with a mitral stenosis —that is, the mitral valve of the heart had become in-

fected and had become calcified so as to reduce the diameter of the orifice of the valve. The medical witnesses testified that this condition as it progresses results in the blood's passing through the valve with increased difficulty. As a result, the heart must pump harder and faster, and to do this becomes enlarged. The heart becomes decompensated when it is unable to meet the increased load. When this condition occurs, death ensues. They also testified that there are various visual symptoms of a decompensating heart, such as shortness of breath and discoloration. One of the main questions involved at the trial was whether the heart condition of deceased had progressed sufficiently so that the added burdens of pregnancy and childbirth might cause the heart to decompensate.

"In support of his defense Dr. Long testified that the deceased first visited him in March of 1937; that he had then examined her and found she had a mitral stenosis; that her heart was a border-line heart; that the compensation was fairly good, but decompensation might occur at any time; that he was not sure at that time she was pregnant; that he formed the opinion at that time that if she were pregnant an abortion was necessary to preserve her life; that he told her to return in two weeks; that he did not see her again until the night of her death. The appellant produced no office record of this visit, but contended that such a record had been made, but that he had been unable to find any such record after the police had visited the

premises. We are of the opinion that the jury might well have disbelieved all of this testimony concerning the March visit. The jury might well have believed from the testimony of the husband concerning the facts surrounding the telephone conversation and the visit to Dr. Long's office of May 19th, that this was the first visit of the wife to Dr. Long's office.

"The appellant further testified that on the evening of May 20th when decedent returned, she explained that she was definitely sure that she was pregnant; that she suffered from a constant tired feeling, from precordial pain and shortness of breath, and that she had a definite palpitation of the heart—all definite indications of a diseased heart. He also testified that he again examined the heart and found the murmurs and thrill which indicated a definite mitral stenosis; that he thereupon concluded that a therapeutic abortion was necessary to preserve her life; that he told the deceased of this conclusion; that she consented to the abortion. Again it is proper to stop and comment on this testimony. We think from all the surrounding circumstances that the jury might well have concluded that this testimony to the effect that he had examined the heart of the deceased and discovered the mitral stenosis was false. The method used by the defendant in his business; his actions in attempting to get Dr. Goldsand to sign the death certificate; his attempt at flight and concealment; his failure to notify the husband of the deceased; his failure to sign a death certificate—all lead to but one inference, and that is that

appellant thought he had performed an illegal operation and that the deceased had died as a result thereof. His actions all demonstrate a consciousness of guilt. However, the mere fact that appellant may have believed or intended to commit an illegal abortion, if in fact it was a legal abortion to preserve life, probably would not make the resulting homicide murder. We may assume, for the purposes of this opinion, that, even though the jury could have found that appellant did not know of the existing heart condition, if, in fact the heart condition was such that an abortion was necessary to attempt to preserve her life, this would be a complete defense to the murder charge.

"Dr. Long then testified as to the method used in performing the operation and as to what then happened. He testified that while performing the operation the patient's heart failed and that he was unable to revive her. The balance of his testimony in which he attempted to explain the reasons for his method of conducting his business; his assuming a false name; his failure to sign the death certificate; his attempt at concealment, etc., need not be here commented on. The jury might well have believed, and apparently did so believe, that such testimony was false.

"As already indicated, it is appellant's main contention that the evidence without conflict established that the heart condition was such that an operation was necessary to attempt to preserve the life of deceased; that she died from the heart condition; that there is no evidence to sustain either a murder or

manslaughter verdict; that in any event he was acquitted of the murder charge and convicted only of manslaughter; that to sustain the manslaughter conviction there must be evidence of lack of due caution and circumspection in the performance of the operation; that there is no such evidence in the record.

"There is no need to review at length the evidence that demonstrates that, had the appellant been convicted of murder, the record would sustain such a conviction. All of the witnesses for both prosecution and defense agreed that the deceased had a mitral stenosis, but there was a sharp conflict as to whether the mitral stenosis had progressed to the point where an abortion would have been necessary, and there was a sharp conflict as to the cause of death. The autopsy surgeon and the pathologist in the coroner's office both testified that the condition of a heart during life could be ascertained from a gross or from a microscopic examination after death; that they had made such an examination; that this heart was not enlarged; that it was not decompensating prior to death but was functioning properly; that the heart condition was an old one and was not progressing; that the heart was in such a condition that the deceased could have gone through a normal labor. The pathologist, Dr. Carr, and several other doctors testified positively that the operation was not necessary to preserve the life of the deceased. Dr. Carr and Dr. Leland testified that deceased did not die from the heart disease but died from the abortion—from surgical shock and hemorrhage caused by the abortion. The husband of the deceased, members

of her family and several of her coworkers testified that deceased possessed none of the visual symptoms that would tend to indicate a dangerous condition of the heart. There was a clear conflict in the evidence as to whether the deceased was in danger from the heart condition, and whether the heart condition caused death. The evidence also showed that in 1932 the deceased gave birth to a child at St. Mary's hospital. The records of that hospital, and the testimony of the doctors there in charge, showed that, although the deceased then had a mitral stenosis, she had a normal labor and delivery; that the heart doctor had then determined that the patient had a well compensated mitral stenosis, which means that the heart was then taking care of itself and there was no sign of decompensation. The doctors then in attendance testified that if her heart was the same in 1937 as in 1932 an abortion was not necessary; that most doctors require some evidence of decompensation before they will abort. They conceded, however, that some doctors advocate an abortion in all cases of mitral stenosis. This was denied by several prosecution witnesses. Several of the doctors testified that correct medical practice would require sending a patient suffering from mitral stenosis to a heart specialist for treatment.

"It is true that there was considerable expert testimony offered by appellant in addition to his own testimony to the effect that an abortion was reasonably required in the instant case. After laying the proper foundation, portions of various medical books were

read into evidence, their general tenor being that some doctors recommend abortions in all cases of mitral stenosis. It also appeared that in November, 1933, deceased visited the Mt. Zion Hospital Clinic. At that time she apparently believed that she was pregnant. Her symptoms were then such that, coupled with the doctor's clinical examination then made of her heart, they testified that, had she been then pregnant, they would have recommended an abortion. It was later discovered she was not then pregnant, so that no abortion was required.

"This review of the record demonstrates that there was sufficient evidence upon which the jury could have found the abortion was not necessary to preserve life, and, therefore, illegal, and that the resulting death was murder in the second degree.

"Appellant contends that even if it be admitted that the evidence was conflicting on whether the abortion was necessary to preserve life, that by the conviction of manslaughter he was acquitted of murder, and therefore the jury determined this conflict in his favor —that is, determined that the abortion was necessary to preserve life. Based on this premise it is next urged that there is no evidence at all of lack of due caution and circumspection in the performance of the operation, and, therefore, there is no evidentiary support for the verdict of manslaughter. The same contention is also made in a slightly different form—that is, that it was error for the trial court to instruct on manslaughter for the reason that there was no evidence to

support such a verdict. In support of these contentions, the appellant mainly relies on *People v. Huntington,* 138 Cal. 261. In that case, which was a prosecution for a homicide growing out of an abortion, the prosecution's only theory was that the abortion was illegal and that the offense, if any, was murder, and, apparently, offered evidence only on this issue. The trial court instructed on, and the defendant was convicted of, manslaughter. This conviction the Supreme Court reversed. The court emphasized that 'The statements of the district attorney, and the whole course of the trial, show that the case was tried upon the sole theory that appellant, who is a physician, caused the death of the deceased by attempting to commit a felony,—to wit, an abortion.' The court recognized that, generally speaking, under an indictment for murder the defendant may be convicted of manslaughter, but held that that rule does not apply when the theory and evidence does not justify a manslaughter verdict. The court held it error to have thus injected manslaughter into the case, and further held that it was error, in view of the record there presented, having instructed on manslaughter, not to have further instructed on the degree of care required to show lack of due caution and circumspection, and that this was not cured by lack of request by appellant of an instruction on that point. The cause was remanded for a new trial. The district attorney then attempted to retry the defendant for murder, apparently on the theory that on this trial he could prove murder, but could only secure a manslaughter conviction on the

murder evidence. In *Huntington v. Superior Court,* 5 Cal. App. 288, it was held that the original conviction of manslaughter constituted an acquittal of murder, and that he could not again be tried for murder. The defendant was then tried for manslaughter and was convicted. In *People v. Huntington,* 8 Cal. App. 612, his conviction was affirmed. On this last trial, the court instructed the jury that if they believed that the evidence showed murder they could convict of manslaughter. There can be no doubt that there is language in each of these three cases inconsistent with language found in the other two. The courts, in more recent cases have attempted, rather unsuccessfully, to reconcile these conflicts. There have been several abortion cases holding that a manslaughter instruction is properly refused where there is no evidence of want of due care. (*People v. Balkwell,* 143 Cal. 259; *People v. Northcott,* 45 Cal. App. 706; *People v. Hickok,* 28 Cal. App. [2d] 574; see, also, *People v. Wright,* 167 Cal. 1.) In *People v. Kelley,* 24 Cal. App. 54, the theory of the first Huntington case was reaffirmed, and a conviction of manslaughter, based on murder evidence in a non-abortion case, reversed.

"The respondent, in support of the contention that it is not reversible error to instruct on manslaughter, even in the absence of evidence of lack of due caution and circumspection, mainly relies on several non-abortion cases where the Huntington cases have been somewhat critically discussed. (*People v. Wolcott,* 137 Cal. App. 355; *People v. Warr,* 22 Cal. App. 663.) He

also relies on the general rule, frequently stated by the courts, that manslaughter is an offense included within murder, and that a manslaughter verdict based on murder evidence will be upheld because the error in instructing on manslaughter, if any, is favorable to defendant and, therefore, he cannot complain. (*People v. Muhlner,* 115 Cal. 303; *People v. Shimonaka,* 16 Cal. App. 117; *People v. Roselle,* 20 Cal. App. 420; *People v. Tugwell,* 32 Cal. App. 520.) We do not find it necessary to pass on this contention. Whatever may be the rule in cases where the defendant is tried solely on the theory that death resulted from an illegal abortion, and no evidence is offered of lack of due caution and circumspection, there can be no doubt that where the main theory of the prosecution is that death resulted from an illegal abortion, but some substantial evidence of want of due caution and circumspection is offered and received, an instruction on manslaughter may properly be given. This problem was involved and fully discussed in *People v. Wright,* 167 Cal. 1, and in *People v. Mowat,* 93 Cal. App. 81. In the first case the trial judge instructed on both murder and manslaughter. The jury convicted of murder, and on appeal it was held not to have been error to instruct on manslaughter, there being some evidence of lack of due caution and circumspection. In the second case, on similar instructions, the jury convicted of manslaughter. This was affirmed on appeal, on the ground that there was evidence of negligent performance of the operation.

"In our opinion, the present case falls within the rule of these last two cited cases. For that reason we do not have to decide now whether in a case where no evidence of lack of due caution and circumspection is offered and received, a manslaughter verdict can be supported solely on murder evidence, or whether, in such a case, it is reversible error to instruct on manslaughter.

"It is true that the respondent seeks to support the verdict solely on the theory above discussed that murder evidence may support a manslaughter verdict, and that no contention is made that there is any evidence that the appellant was guilty of lack of due caution and circumspection in the performance of the operation—in fact, in discussing another point, at page 48 of the brief of the attorney general it is stated: 'in this case the question of malpractice was not in issue; nor was there in this case any question presented during the trial concerning the performance of the operation without due caution and circumspection'. This concedes entirely too much. A reading of the record demonstrates two things—first, that from the very first of the trial the prosecuting attorney refused to limit himself to the theory of murder; and second, that there is substantial evidence from which the jury might well have inferred that appellant did not use due caution and circumspection in the performance of the operation, and that the death resulted therefrom. In his opening statement to the jury the prosecuting attorney referred to the fact that he would prove, among other

things, that the cervix of deceased was 'torn, dilated and mutilated'. Before a witness was sworn, the attorney for defendant demanded to know whether one of the theories of the prosecution was to be lack of due care on the part of Dr. Long. The court refused to compel the prosecutor to definitely state, pointing out to counsel that they could not now complain of surprise because they were being warned in advance that they would be expected to defend against that theory. Finally, after considerable argument, the trial judge informed defendant and his counsel that both murder and manslaughter were involved in the charge. No claim of surprise or being misled can now be made.

"Now as to the evidence. As already indicated, the main theory of the prosecution was that death resulted from an illegal abortion, and the major portion of the evidence introduced was introduced on this theory. However, all of the medical witnesses for the prosecution were asked questions and were cross-examined on points relating to the charge of lack of due caution and circumspection.

"Dr. Carr, pathologist to the coroner's office, testified that one of the causes of death was shock and hemorrhage following an interrupted pregnancy; that the mitral stenosis had existed since childhood and was not progressive; that the cervix shows a lateral laceration on either side, meaning 'that the cervix has been manually torn by an instrument'; that 'the cervix had been actually torn from the opening to the uterus and

blood had run from these areas into the tissue adjacent to the tear'; that 'part of the placenta that was nourishing this baby had actually been pulled out through the cervix into the vagina'; that 'apparently an attempt had been made to enter her cervical canal, and by some false jabbing the upper vaginal reflection had actually been torn'; that a proper therapeutic abortion is performed in a hospital; that in a proper operation the uterus is dilated slowly with progressive dilators; that progressive dilators will not tear the cervix; that the tears here present indicate progressive dilators were not used. Dr. Long admitted using a type of dilator which Dr. Carr testified was not the proper or approved type. Dr. Carr also testified that, according to approved practice, a therapeutic abortion is performed in a hospital because, among other things, an oxygen tank and carbon dioxide are available for emergencies. These emergency facilities were not present at the Haight street flat of appellant. Dr. Carr also testified that the tearing and mutilation and puncturing of the cervix, described by him, is a painful and shocking procedure, and would produce shock in the entire body, and that deceased died from shock; that it is the usual custom and practice of doctors to give a general anesthesia when performing an abortion, for the reason that this reduces shock; that with 'the mutilation and the perforation one sees here, a rather deep anesthesia would be required to reduce the pain'. Dr. Long testified he did not use a general anesthesia. There was other medical testimony that if a person possessed the symptoms of a decompensat-

ing heart testified to by Dr. Long, that approved practice, before performing the abortion, would be to send the patient to a heart specialist and to hospitalize her for some time to build up her heart so it could stand the abortion; that the type of local anesthetic used by appellant would not render the patient immune from pain.

"Other testimony could be referred to from which the jury could have inferred that appellant did not exercise that care and circumspection required in such cases. The testimony recited is sufficient to support the manslaughter verdict."

Appellant also contends that the trial court committed prejudicial error in the giving of certain instructions. With regard to the question of reasonable doubt the trial court instructed the jury as follows:

"If you find from the evidence beyond reasonable doubt that the defendant Claude C. Long performed or attempted to perform an operation upon the person of the deceased for the purpose of delivering an unborn child and that the operation or attempted operation was performed with due caution and circumspection, and if you believe from all of the evidence that the operation was necessary to preserve the life of the decedent and that death resulted from such operation, you shall nevertheless find the defendant not guilty; *but on the other hand,* if you believe beyond a reasonable doubt that due caution and circumspection were not exercised and if you believe that the operation was

not necessary to preserve the life of Genevieve Argan-bright and that death resulted from such operation, then it is your duty to bring in a verdict of guilty." (Emphasis added.)

The first portion of that instruction, which in effect told the jury that it would have to find that defendant had established his defense "beyond reasonable doubt" before he could be found not guilty, was clearly erroneous. However, that portion of the instruction was requested by defendant. Of its own motion the court added the latter portion which begins with the words in italics, and which constitutes a correct statement of the law, though not as clear as might be desired. In other words, by its addition to the instruction the court was thereby informing the jury that should it find beyond a reasonable doubt that the operation was not performed with due care and circumspection it should bring in a verdict of guilty of manslaughter,—whereas if it found beyond a reasonable doubt that the operation was not necessary to preserve life it should bring in a verdict of guilty of murder in the second degree. The joining of those two theories in one instruction, although perhaps confusing, could have caused no prejudice to defendant because, by reason of his acquittal on the second degree murder charge, it could not now be argued that the jury may have been misled into bringing in a verdict of guilty on said charge, though only a showing of lack of due care and circumspection may have been made and found by the jury. But with reference to the instruction con-

sidered as a whole, defendant seeks to invoke the rule that where the court modifies a proffered instruction, if erroneous, the error becomes that of the court. Although the rule is as stated, this is not a case where a change made by the trial judge has brought about the error complained of. Here the language added by the court was correct in itself, as hereinbefore explained. The substance of the erroneous instruction as requested by defendant was not altered in any respect. The only change made by the court was by way of addition to that which had been proposed by defendant. Had the two portions of the instruction been separated by a period, it is improbable that a claim of modification would have been made. Also, the first part of the instruction, as proffered by defendant, consisted of a purported statement of the law complete in itself, as did also the latter part which was given by the trial court of its own motion. In those circumstances, therefore, it cannot successfully be argued that by the giving of the latter part of the instruction the trial court *modified* the first part, so as to compel invocation of the rule that where a trial court modifies a proposed instruction, if erroneous, the error becomes that of the court. (*Baker v. Borello,* 131 Cal. 615; 2 Cal. Jur., pp. 848, 849.)

Another instruction complained of by appellant related to the subject of expert testimony. It reads as follows:

(1) "Duly qualified experts may give their opinions on questions in controversy at a trial to assist the

jury in deciding such questions. The jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable.

(2) "You are instructed that in considering the expert testimony which has been offered in this case, you should weigh it with all the other evidence in the case; you are not bound to determine any fact in accordance with the opinion of such expert, if not convincing to your mind.

(3) "You are instructed that you may regard the testimony of an expert as merely *advisory,* and you are instructed that *you may disregard altogether the testimony of such expert,* and you may form your own conclusions from all the evidence submitted to you.

(4) "After considering all these things, and any other circumstances in evidence, you are to give such testimony such weight as you, in your judgment, think it is entitled to, and if convincing and carrying with it a belief in its truth, act upon it; if not, you may and you have a right to reject it." (Emphasis added.)

The first paragraph of that instruction is substantially identical with the provisions of section 1127b of the Penal Code. However, the language of that portion of the instruction to which appellant directs

his criticism is that which appears in italics in paragraph three. Unquestionably this was an unfortunate choice of words resulting in possible ambiguity, but when considered in its entirety, as any instruction must be considered, it was not prejudicially erroneous. Certainly, "the jury may disregard altogether the testimony of such expert" if it is not based upon substantial reasons or there are circumstances justifying a determination that it has no probative value or it is unreasonable. We must assume that the jurors, as persons of ordinary intelligence, understood that the testimony of an expert was not to be disregarded capriciously but should be considered in accordance with the rules which had been stated to them. The cases of *Pearson v. Crabtree,* 70 Cal. App. 52, 58, and *Hirshfeld v. Dana,* 193 Cal. 142, 153, cited by appellant in support of his contention that the instruction was erroneous and prejudicial to his rights, were civil cases which had been decided prior to the enactment of section 1127b of the Penal Code.

Appellant further contends that the trial court erred in refusing to grant defendant a new trial, the motion for which was made on the grounds of (1) newly-discovered evidence, and of (2) asserted misconduct of the jury. The purpose of the proposed newly-discovered evidence was to impeach the testimony of the husband of the deceased. It has been ruled that newly-discovered evidence which would tend merely to impeach a witness is not of itself sufficient ground for granting a new trial. (*People v.*

Granillo, 140 Cal. App. 707, 719; *People v. Vejar,* 93 Cal. App. 259.) To warrant the granting of a new trial on the ground of newly-discovered evidence it must be such as to render a different verdict reasonably probable on a new trial. (*People v. Shaver,* 7 Cal. [2d] 586, 593; *Brannock v. Bromley,* 30 Cal. App. [2d] 516, 520.) In the opinion of this court such a result would not have been accomplished herein if a new trial had been granted. Under all the circumstances it cannot be said that the trial court abused its discretion in that respect.

In support of his motion for a new trial on the ground of asserted misconduct of the jurors, defendant introduced the affidavits of four of the jurors in which each asserted that during the deliberations of the jury certain jurors had read a newspaper article pertaining to the "flaying of abortionists" by a witness called by the prosecution. The trial court refused to consider those affidavits on the ground that the jurors could not impeach their own verdict. There is no error in that ruling. (*People v. Wong Loung,* 159 Cal. 520.)

It is unnecessary to consider other points advanced by appellant in support of his contention that the judgment should be reversed. An examination of the entire record, including all of the evidence, reveals no prejudicial error.

The judgment and order are affirmed.

Dissenting opinion

I dissent.

In my opinion the giving of the instruction to the jury: "that you may regard the testimony of an expert as merely *advisory,* and you are instructed that *you may disregard altogether the testimony of such expert,* and you may form your own conclusions from all the evidence submitted to you", constituted prejudicial error and justifies a reversal of this case.

The majority opinion states:

"There can be no doubt that the deceased was suffering from a heart affected with a mitral stenosis —that is, the mitral valve of the heart had become infected and had become calcified so as to reduce the diameter of the orifice of the valve. The medical witnesses testified that this condition as it progresses results in the blood's passing through the valve with increased difficulty. As a result, the heart must pump harder and faster, and to do this becomes enlarged. The heart becomes decompensated when it is unable to meet the increased load. When this condition occurs, death ensues. They also testified that there are various visual symptoms of a decompensating heart, such as shortness of breath and discoloration. One of the main questions involved at the trial was whether the heart condition of deceased had progressed sufficiently so that the added burdens of pregnancy and childbirth might cause the heart to decompensate."

In other words, the principal issue in the trial of this case and the sole foundation stone upon which the defense was based, namely, that the performance of the abortion was necessary to preserve the life of the deceased, was of necessity, and in the very nature of things, predicated solely upon expert testimony. Common sense as well as legal reasoning dictates that no one without expert knowledge and skill in the subjects of anatomy and medical science would be qualified to testify on this subject, and it has been the settled law of this state for decades that when the sole issue in a case is the subject of expert knowledge of medical science, that such issue must be decided solely upon the testimony of those learned in the practice of medicine and surgery. (*Perkins v. Trueblood,* 180 Cal. 437; *Arnold v. Hopkins,* 203 Cal. 553; *Houghton v. Dickson,* 29 Cal. App. 321; *Dameron v. Ansbro,* 39 Cal. App. 289; *Pearson v. Crabtree,* 70 Cal. App. 52; *William Simpson Construction Company v. Industrial Accident Commission,* 74 Cal. App. 239; *Ingamells v. Goodfellow,* 109 Cal. App. 62; *Roberts v. Parker,* 121 Cal. App. 264.)

In a very able and exhaustive opinion written by my learned associate, Mr. Justice Curtis, in the case of *Pearson v. Crabtree,* supra, when he was a member of the District Court of Appeal of the Second Appellate District, this very sound proposition of law was enunciated, and its soundness or the justness of its application to cases of this character has never been questioned. In that case the plaintiff sued the de-

fendant, a physician for malpractice and recovered a verdict in the trial court. The court refused to give the following instruction requested by the defendant:

"The court instructs you that in considering whether the defendant in his examination, diagnosis, treatment and care of plaintiff's injured limb exercised ordinary care and skill, you cannot set up a standard of your own, but must be guided in that regard solely by the testimony of physicians; and if you are unable to determine from the testimony of the physicians introduced as experts, what constitutes ordinary care and skill under the circumstances of this case, then there is a failure of proof upon the only standard for your guidance, and the evidence is therefore insufficient to warant a verdict for the plaintiff." But on its own motion gave the following instruction:

"You are instructed that the opinions of the doctors who have testified in this case as experts are merely advisory, and you are not bound to accept such opinions as true. You should accord to such opinions such weight as from all the facts and circumstances in the case you may believe they are entitled to receive; or you may altogether disregard such opinions in so far as you may believe from all the facts and circumstances in the case that such opinions are unreasonable." In that case Mr. Justice Curtis stated:

"The authorities from other jurisdictions appear to be in accord upon this question with the rulings of the Supreme Court of the State of Colorado and

that of our own state. It necessarily follows, therefore, if this instruction refused by the court correctly stated the law, then it was prejudicial error for the court to give the second instruction above set out, which it gave upon its own motion. For in this second instruction the court told the jury that they might disregard altogether the opinions of the experts testifying in the case, if, from all the facts and circumstances in the case, they believed that such opinions were unreasonable. In other words, the court in effect instructed the jury that if there were facts and circumstances in the case, testified to by lay witnesses, which the jury believed and which rendered the opinions given in the case by expert witnesses unreasonable, then the jury were at liberty to reject altogether the opinions of the experts. As we have already noted, such is not the accepted rule, and to so instruct the jury was highly prejudicial to the rights of the appellants. * * * We, therefore, are of the opinion that the rule of law set forth in the above instruction which the court refused to give was applicable to the issues in this case, and it was therefore error on the part of the court, prejudicial to the rights of the defendants, to give the instruction which it did and whereby it instructed the jury that the opinions of the doctors were merely advisory and that the jury were not bound to accept them, but might disregard them altogether if from all the facts and the circumstances in the case they believed them unreasonable.

"Judgment is reversed."

The case of *Pearson v. Crabtree,* supra, has been uniformly followed in this and other jurisdictions where the common law prevails and is recognized as the settled law of this state.

There is little doubt, in my opinion, that if the case at bar were a civil action in which a judgment had been recovered by a plaintiff upon the same factual situation as that disclosed by the record in this case, and such an instruction had been given as the one quoted in the majority opinion in this case, this court would have no hesitancy in reversing such a judgment upon the authority of the case of *Pearson v. Crabtree,* supra, and *Hirshfeld v. Dana,* 193 Cal. 142, upon the ground that such instruction was prejudicially erroneous and probably resulted in a miscarriage of justice.

To hold that the giving of such an instruction as the one given in the case at bar is prejudicial in a civil case and not in a criminal case, is to my mind a holding in effect that life and liberty are of less concern to human beings than property. I am opposed to any such concept and I firmly believe that the application of the law should be more rigid and more strictly construed in the protection of the lives and liberties of our people than in the protection of their property rights.

There can be no escape from the conclusion that the jury in the case at bar were plainly told by the trial judge not only that they could regard the testimony of an expert as merely *advisory,* but that they

may disregard altogether the testimony of such expert, and form their own conclusions from all the evidence submitted to them. To say that such an instruction did not deprive the defendant of the benefit of the expert testimony submitted by both the prosecution and the defense is stating an obvious contradiction. If such an instruction can be cured by the application of section 4½ of article VI of the Constitution, then in my opinion it must necessarily follow that a defendant in a criminal case is not entitled as a matter of legal right to have the jury instructed on the law applicable to the facts of the case presented to the trial court during the trial of his case and that this section of the Constitution can be resorted to for the purpose of depriving a person of the equal protection of the law guaranteed by the 14th Amendment to the Constitution of the United States.

In my opinion, the effect of the giving of the above-mentioned instruction was to deprive the defendant of the fair and impartial trial guaranteed by the Constitution and laws of this state and that the judgment and order denying him a new trial should be reversed.

Carter, J.

Filed June 27, 1940,
B. Grant Taylor, Clerk,
By I. M. Johnson, Deputy Clerk.

(Vol. 99 Cal. App. Dec. 497.) (96 Pac. (2d) 354.)

Opinion of District Court of Appeal, First Appellate District

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Appellant Dr. Claude C. Long, his wife, and one Ann Fisher, were charged with the murder of Genevieve Arganbright. Admittedly the death occurred while Dr. Long was performing an abortion upon the deceased. The jury acquitted Mrs. Long and Ann Fisher, but found Dr. Long guilty of manslaughter. From the order denying his motion for a new trial and from the judgment of conviction this appeal has been taken.

Appellant urges three main contentions on this appeal:

1. That the evidence is insufficient to show either murder or manslaughter; that the cause was tried solely on the theory that the death resulted from an illegal abortion; that there is no evidence to show that the operation was performed without due caution and circumspection; that under such circumstances it was error to instruct on manslaughter; that the conviction for manslaughter constituted an implied acquittal on the murder charge, and constituted a determination that the operation was lawful; that the manslaughter verdict, based on the theory of a lawful operation performed without due caution and circumspection, is totally unsupported by the evidence.

2. That the trial court erred in the giving of several instructions.

3. That the trial court committed error in denying the motion for a new trial on the ground of newly discovered evidence and misconduct of the jury. In view of our conclusion that the cause must be reversed on the ground of misdirection of the jury, the third allegation of error need not be discussed. The first allegation of error must be discussed for the guidance of the trial court on the new trial.

The evidence shows that Dr. Long, a duly licensed physician, maintained two offices—one on Valencia street and one on Haight street, both in San Francisco. The Valencia street office was in the middle flat of the building, had the doctor's name on the window, and his telephone was listed in the directory. The defendant Fisher, who is related to the Longs, was in charge of this office. When visited by the police, after the homicide, no medical or surgical equipment of any kind was found in this flat. Dr. Long testified that he seldom saw any patients at this office; that patients called there, or telephoned, and that Mrs. Fisher made appointments for them. The evidence also shows that in the flat above the offices occupied by Long on Valencia street there lived a Mrs. Spence, who was married to Mrs. Long's brother. She testified that defendant Fisher resided at the rear of the offices, and that in the time that she had been living there she had never seen Dr. Long on the premises.

Dr. Long admittedly used the Haight street premises for seeing and treating his patients. These premises had been rented by Mrs. Long under the name

of Young. A telephone was located at these premises under the name of Young, but at the request of the Longs the number was not listed in the telephone directory. The appellant frequently parked his automobile in a garage about seven blocks from the Haight street flat. On occasion the garageman accompanied Long to within a half block of the flat, where Long would get out of the car and the garageman would return the automobile to the garage. When arrested Long had in his possession keys to the back doors of these premises, but none fitted the front door. When visited by the police, after the homicide, an operating table and accessories, and various medicines used in connection with operations on women were found in the flat. Some instruments used in performing abortions were found in a closet, but the actual instruments used by the appellant in performing the abortion on Mrs. Arganbright were admittedly removed by him the night she died and turned over to the police later at the time of his arrest.

The husband of the deceased testified that his wife was two and one-half months pregnant, was apparently in good health, and that she possessed none of the visual symptoms of a bad heart. He further stated she was athletic and took long hikes, danced, liked to swim and play tennis, and, although she worked for the W. P. A. during the day, performed the usual household tasks. On May 19, 1937, the deceased, in the presence of her husband, telephoned to Dr. Long's Valencia street office and asked the woman who answered the phone for an appointment. She was told

to call at that office between two and four o'clock. Mr. and Mrs. Arganbright called that afternoon at the Valencia street office, where they were admitted by defendant Fisher. In the presence of the husband, Fisher asked the deceased her name, and questioned her concerning the identity of her companion. The husband was placed in one room and the deceased and Fisher went into another. The husband overheard Fisher ask the deceased how long she had been pregnant, and also heard Fisher tell his wife not to bring her husband along when she returned the next night.

The next day, May 20, 1937, Mrs. Arganbright went to work and returned home at the usual hour. She left home at about quarter to seven in the evening, telling her husband she was going to have an abortion performed by Dr. Long; that she was going by street car to the Valencia street office, where she was to be taken by a chauffeur to some place on Haight street. When she left her home she had with her $50 which she had borrowed, which sum Fisher had told her the day before was necessary for the operation.

Late in the evening of May 20, 1937, Mrs. Arganbright died at the Haight street premises while the appellant was performing an abortion upon her.

So far as the prosecution's case is concerned, chronologically, the next pertinent testimony was given by Dr. Goldsand. He testified that between 10:20 and 10:30 p. m. he received a telephone call from defendant Fisher; that she asked him to come immediately to the Haight street premises to see a

very sick patient; that he arrived in eight or ten minutes; that Fisher admitted him and told him to hurry up the stairs; that he was ushered into a bedroom where he saw Dr. and Mrs. Long and the deceased, who was lying on a bed, attired in her street clothes, her lower extremities being covered with a blanket. The appellant asked Dr. Goldsand to examine the patient. Upon examination Dr. Goldsand ascertained that Mrs. Arganbright was dead. He administered ephedrin sulphate, but it did not revive the patient. He then told Dr. Long the woman was dead. He testified that Long then asked him to sign the death certificate, but he refused, informing Long that because he was the physician who had attended the deceased during her lifetime, it was his, Long's, duty to sign the death certificate. Long, he stated, remained silent, whereupon he, Goldsand, left the premises. Dr. Long testified that he understood Dr. Goldsand to state he would sign the certificate. This conflict, in view of the conviction, must be resolved in favor of the prosecution.

The next link in the prosecution's chain of evidence was furnished by an employee of an undertaking establishment in San Francisco. He testified that he and a fellow employee went to the Haight street flat to get a body in response to a telephone call; that he arrived at about 2:30 a. m. of the morning of May 21st; that he met Mrs. Long and Ann Fisher there; that Dr. Long was not there; that he was informed by the two women that they were not members of the deceased's family but were "very dear friends"; that the relatives had

left and would complete arrangements with the undertaking parlor in the morning; that Dr. Goldsand had been the attending physician and that he had been in attendance for at least half an hour before she passed away; that the deceased had died from a heart attack. In response to an inquiry as to whether there was a telephone in the flat from which he could phone Dr. Goldsand for verification he was told that there was no telephone; that Dr. Goldsand had stated everything was in order and that he would sign the death certificate in the morning. The next morning the body was embalmed, and in the afternoon, when no relatives had called, or death certificate had been signed, the matter was referred to the coroner. Both Dr. Goldsand and the employees of the undertaking establishment testified as to the physical appearance of the body. The conditions testified to were consistent with the defense's theory that the deceased had died from heart failure.

On the morning of May 21st the appellant and his wife registered at the Chancellor Hotel in San Francisco under the false and assumed names of Mr. and Mrs. C. Young of Sonora, California. At the time they registered they were informed that all rooms had been engaged for that night and that they must give up their room by 4 p. m. They left the Chancellor Hotel before 4 p. m. and went to the Cecil Hotel where they again registered under false and assumed names.

Late in the afternoon of May 21st the husband of deceased telephoned the Valencia street office of appellant. Defendant Fisher answered the telephone, and

told him that she knew nothing of his wife's whereabouts, and that Dr. Long was out of town. Later the police arrived, and he then discovered his wife was dead.

Dr. and Mrs. Long were arrested at the Cecil Hotel on May 22nd. At that time, after telephoning to their attorney, they had changed their registration and were registered under their proper names. Defendant Fisher left San Francisco and was located several weeks later in Nevada City.

On the trial neither Mrs. Long nor Ann Fisher took the witness stand. Appellant Long did take the stand in his own behalf, and testified in detail concerning the facts and circumstances surrounding the death.

It was the main theory of the prosecution that Genevieve Arganbright had died as the result of an illegal abortion; that the abortion was not necessary to preserve her life; that she died as a result of surgical shock and from hemorrhage caused by the abortion; that she did not die as a result of a heart condition. However, although this was the main theory of the prosecution, it was not the only theory. As will later appear in detail, the prosecution from the very first of the trial refused to limit itself to this theory, and offered testimony that the death resulted from an abortion performed without due caution and circumspection. This distinction becomes important because, so far as this case is concerned to constitute murder, an abortion must be an illegal abortion—that is, one not necessary to preserve the life of the woman aborted (sec. 274, Pen. Code), while to constitute man-

slaughter, an abortion must be a lawful abortion, performed "without due caution and circumspection". (Sec. 192, Pen. Code.) The main theory of the defense was that the operation was necessary to preserve the life of the deceased; that the deceased had an ailing heart resulting from a mitral stenosis; that this heart might decompensate at any time; that this heart could not stand the burdens of full pregnancy and of childbirth; that the interruption of the pregnancy was necessary to preserve her life; that the operation was performed with due caution and circumspection; that Mrs. Arganbright died from the heart condition.

There can be no doubt that the deceased was suffering from a heart affected with a mitral stenosis—that is, the mitral valve of the heart had become infected and had become calcified so as to reduce the diameter of the orifice of the valve. The medical witnesses testified that this condition as it progresses results in the blood's passing through the valve with increased difficulty. As a result, the heart must pump harder and faster, and to do this becomes enlarged. The heart becomes decompensated when it is unable to meet the increased load. When this condition occurs, death ensues. They also testified that there are various symptoms of a decompensating heart, such as shortness of breath and discoloration. One of the main questions involved at the trial was whether the heart condition of deceased had progressed sufficiently so that the added burdens of pregnancy and childbirth might cause the heart to decompensate.

In support of his defense Dr. Long testified that the deceased first visited him in March of 1937; that he

had then examined her and found she had a mitral stenosis; that her heart was a border-line heart; that the compensation was fairly good, but decompensation might occur at any time; that he was not sure at that time that if she were pregnant an abortion was necessary to preserve her life; that he told her to return in two weeks; that he did not see her again until the night of her death. The appellant produced no office record of this visit, but contended that such a record had been made, but that he had been unable to find any such record after the police had visited the premises. We are of the opinion that the jury might well have disbelieved all of this testimony concerning the March visit. The jury might well have believed from the testimony of the husband concerning the facts surrounding the telephone conversation and the visit to Dr. Long's office of May 19th, that this was the first visit of the wife to Dr. Long's office.

The appellant further testified that on the evening of May 20th when decedent returned, she explained that she was definitely sure that she was pregnant; that she suffered from a constant tired feeling, from precordial pain and shortness of breath, and that she had a definite palpitation of the heart—all definite indications of a diseased heart. He also testified that he again examined the heart and found the murmurs and thrill which indicated a definite mitral stenosis; that he thereupon concluded that a therapeutic abortion was necessary to preserve her life; that he told the deceased of this conclusion; that she consented to the abortion. Again it is proper to stop and comment on

this testimony. We think from all the surrounding circumstances that the jury might well have concluded that this testimony to the effect that he had examined the heart of the deceased and discovered the mitral stenosis was false. The method used by the defendant in his business; his actions in attempting to get Dr. Goldsand to sign the death certificate; his attempt at flight and concealment; his failure to notify the husband of the deceased; his failure to sign a death certificate—all lead to but one inference, and that is that appellant thought he had performed an illegal operation and that the deceased had died as a result thereof. His actions all demonstrate a consciousness of guilt. However, the mere fact that appellant may have believed or intended to commit an illegal abortion, if in fact it was a legal abortion to preserve life, probably would not make the resulting homicide murder. We may assume, for the purposes of this opinion, that, even though the jury could have found that appellant did not know of the existing heart condition, if, in fact the heart condition was such that an abortion was necessary to attempt to preserve her life, this would be a complete defense to the murder charge.

Dr. Long then testified as to the method used in performing the operation and as to what then happened. He testified that while performing the operation the patient's heart failed and that he was unable to revive her. The balance of his testimony in which he attempted to explain the reasons for his method of conducting his business; his assuming a false name; his failure to sign the death certificate; his attempt

at concealment, etc., need not be here commented on. The jury might well have believed, and apparently did so believe, that such testimony was false.

As already indicated, it is appellant's main contention that the evidence without conflict established that the heart condition was such that an operation was necessary to attempt to preserve the life of deceased; that she died from the heart condition; that there is no evidence to sustain either a murder or manslaughter verdict; that in any event he was acquitted of the murder charge and convicted only of manslaughter; that to sustain the manslaughter conviction there must be evidence of lack of due caution and circumspection in the performance of the operation; that there is no such evidence in the record.

There is no need to review at length the evidence that demonstrates that, had the appellant been convicted of murder, the record would sustain such a conviction. All of the witnesses for both prosecution and defense agreed that the deceased had a mitral stenosis, but there was a sharp conflict as to whether the mitral stenosis had progressed to the point where an abortion would have been necessary, and there was a sharp conflict as to the cause of death. The autopsy surgeon and the pathologist in the coroner's office both testified that the condition of a heart during life could be ascertained from a gross or from a microscopic examination after death; that they had made such an examination; that this heart was not enlarged; that it was not decompensating prior to death but was functioning properly; that the heart condition was an old

one and was not progressing; that the heart was in such a condition that the deceased could have gone through a normal labor. The pathologist, Dr. Carr, and several other doctors testified positively that the operation was not necessary to preserve the life of the deceased. Dr. Carr and Dr. Leland testified that deceased did not die from the heart disease but died from the abortion—from surgical shock and hemorrhage caused by the abortion. The husband of the deceased, members of her family and several of her co-workers testified that deceased possessed none of the visual symptoms that would tend to indicate a dangerous condition of the heart. There was a clear conflict in the evidence as to whether the deceased was in danger from the heart condition, and whether the heart condition caused death. The evidence also showed that in 1932 the deceased gave birth to a child at St. Mary's hospital. The records of that hospital, and the testimony of the doctors there in charge, showed that, although the deceased then had a mitral stenosis, she had a normal labor and delivery; that the heart doctor had then determined that the patient had a well compensated mitral stenosis, which means that the heart was then taking care of itself and there was no sign of decompensation. The doctors then in attendance testified that if her heart was the same in 1937 as in 1932 an abortion was not necessary; that most doctors require some evidence of decompensation before they will abort. They conceded, however, that some doctors advocate an abortion in all cases of mitral stenosis. This was denied by several prosecution witnesses. Several of the doctors testified that

correct medical practice would require sending a patient suffering from mitral stenosis to a heart specialist for treatment.

It is true that there was considerable expert testimony offered by appellant in addition to his own testimony to the effect that an abortion was reasonably required in the instant case. After laying the proper foundation, portions of various medical books were read into evidence, their general tenor being that some doctors recommend abortions in all cases of mitral stenosis. It also appeared that in November, 1933, deceased visited the Mt. Zion Hospital Clinic. At that time she apparently believed that she was pregnant. Her symptoms were then such that, coupled with the doctors' clinical examination then made of her heart, they testified that, had she been then pregnant, they would have recommended an abortion. It was later discovered she was not then pregnant, so that no abortion was required.

This review of the record demonstrates that there was sufficient evidence upon which the jury could have found the abortion was not necessary to preserve life, and, therefore, illegal, and that the resulting death was murder in the second degree.

Appellant contends that even if it be admitted that the evidence was conflicting on whether the abortion was necessary to preserve life, that by the conviction of manslaughter he was acquitted of murder, and therefore the jury determined this conflict in his favor —that is, determined that the abortion was necessary to preserve life. Based on this premise it is next

urged that there is no evidence at all of lack of due caution and circumspection in the performance of the operation, and, therefore, there is no evidentiary support for the verdict of manslaughter. The same contention is also made in a slightly different form—that is, that it was error for the trial court to instruct on manslaughter for the reason that there was no evidence to support such a verdict. In support of these contentions, the appellant mainly relies on *People v. Huntington,* 138 Cal. 261. In that case, which was a prosecution for a homicide growing out of an abortion, the prosecution's only theory was that the abortion was illegal and that the offense, if any, was murder, and, apparently, offered evidence only on this issue. The trial court instructed on, and the defendant was convicted of, manslaughter. This conviction the Supreme Court reversed. The court emphasized that "The statements of the district attorney, and the whole course of the trial, show that the case was tried upon the sole theory that appellant, who is a physician, caused the death of the deceased by attempting to commit a felony,—to wit, an abortion." The court recognized that, generally speaking, under an indictment for murder the defendant may be convicted of manslaughter, but held that that rule does not apply when the theory and evidence does not justify a manslaughter verdict. The court held it error to have thus injected manslaughter into the case, and further held that it was error, in view of the record there presented, having instructed on manslaughter, not to have further instructed on the degree of care required to show lack of due caution and circumspection, and that this

was not cured by lack of request by appellant of an instruction on that point. The cause was remanded for a new trial. The district attorney then attempted to retry the defendant for murder, apparently on the theory that on this trial he could prove murder, but could only secure a manslaughter verdict on the murder evidence. In *Huntington v. Superior Court,* 5 Cal. App. 288, it was held that the original conviction of manslaughter constituted an acquittal of murder, and that he could not again be tried for murder. The defendant was then tried for manslaughter and was convicted. In *People v. Huntington,* 8 Cal. App. 612, his conviction was affirmed. On this last trial, the court instructed the jury that if they believed that the evidence showed murder they could convict of manslaughter. There can be no doubt that there is language in each of these three cases inconsistent with language found in the other two. The courts, in more recent cases have attempted, rather unsuccessfully, to reconcile these conflicts. There have been several abortion cases holding that a manslaughter instruction is properly refused where there is no evidence of want of due care. (*People v. Balkwell,* 143 Cal. 259; *People v. Northcott,* 45 Cal. App. 706; *People v. Hickok,* 28 Cal. App. (2d) 574; see, also, *People v. Wright,* 167 Cal. 1.) In *People v. Kelley,* 24 Cal. App. 54, the theory of the first *Huntington* case was reaffirmed, and a conviction of manslaughter, based on murder evidence in a non-abortion case, reversed.

The respondent, in support of the contention that it is not reversible error to instruct on manslaughter,

even in the absence of evidence of lack of due caution and circumspection, mainly relied on several non-abortion cases where the *Huntington* cases have been somewhat critically discussed. (*People v. Wolcott*, 137 Cal. App. 355; *People v. Warr*, 22 Cal. App. 663.) He also relies on the general rule, frequently stated by the courts, that manslaughter is an offense included within murder, and that a manslaughter verdict based on murder evidence will be upheld because the error in instructing on manslaughter, if any, is favorable to defendant and, therefore, he cannot complain. (*People v. Muhlner*, 115 Cal. 303; *People v. Shimonaka*, 16 Cal. App. 117; *People v. Roselle*, 20 Cal. App. 420; *People v. Tugwell*, 32 Cal. App. 520.) We do not find it necessary to pass on this contention. Whatever may be the rule in cases where the defendant is tried solely on the theory that death resulted from an illegal abortion, and no evidence is offered of lack of due caution and circumspection, there can be no doubt that where the main theory of the prosecution is that death resulted from an illegal abortion, but some substantial evidence of want of due caution and circumspection is offered and received, an instruction on manslaughter may properly be given. This problem was involved and fully discussed in *People v. Wright*, 167 Cal. 1, and in *People v. Mount*, 93 Cal. App. 81. In the first case the trial judge instructed on both murder and manslaughter. The jury convicted of murder, and on appeal it was held not to have been error to instruct on manslaughter, there being some evidence of lack of due caution and circumspection. In the second case, on similar instructions, the jury convicted of man-

slaughter. This was affirmed on appeal, on the ground that there was evidence of negligent performance of the operation.

In our opinion, the present case falls within the rule of these last two cited cases. For that reason we do not have to decide now whether in a case where no evidence of lack of due caution and circumspection is offered and received, a manslaughter verdict can be supported solely on murder evidence, or whether, in such a case, it is reversible error to instruct on manslaughter.

It is true that the respondent seeks to support the verdict solely on the theory above discussed that murder evidence may support a manslaughter verdict, and that no contention is made that there is any evidence that the appellant was guilty of lack of due caution and circumspection in the performance of the operation—in fact, in discussing another point, at page 48 of the brief of the attorney general it is stated: "in this case the question of malpractice was not in issue; nor was there in this case any question presented during the trial concerning the performance of the operation without due caution and circumspection." This concedes entirely too much. A reading of the record demonstrates two things—first, that from the very first of the trial the prosecuting attorney refused to limit himself to the theory of murder; and second, that there is substantial evidence from which the jury might well have inferred that appellant did not use due caution and circumspection in the performance of the operation, and that the death resulted therefrom.

In his opening statement to the jury the prosecuting attorney referred to the fact that he would prove, among other things, that the cervix of deceased was "torn, dilated and mutilated". Before a witness was sworn, the attorney for defendant demanded to know whether one of the theories of the prosecution was to be lack of due care on the part of Dr. Long. The court refused to compel the prosecutor to definitely state, pointing out to counsel that they could not now complain of surprise because they were being warned in advance that they would be expected to defend against that theory. Finally, after considerable argument, the trial judge informed defendant and his counsel that both murder and manslaughter were involved in the charge. No claim of surprise or being misled can now be made.

Now as to the evidence. As already indicated, the main theory of the prosecution was that death resulted from an illegal abortion, and the major portion of the evidence introduced was introduced on this theory. However, all of the medical witnesses for the prosecution were asked questions and were cross-examined on points relating to the charge of lack of due caution and circumspection.

Dr. Carr, pathologist to the coroner's office, testified that one of the causes of death was shock and hemorrhage following an interrupted pregnancy; that the mitral stenosis had existed since childhood and was not progressive; that the cervix shows a lateral laceration on either side, meaning "that the cervix has been manually torn by an instrument"; that "the cervix

had been actually torn from the opening to the uterus and blood had run from these areas into the tissue adjacent to the tear"; that "part of the placenta that was nourishing this baby had actually been pulled out through the cervix into the vagina"; that "apparently an attempt had been made to enter her cervical canal, and by some false jabbing the upper vaginal reflection had actually been torn"; that a proper therapeutic abortion is performed in a hospital; that in a proper operation the uterus is dilated slowly with progressive dilators; that progressive dilators will not tear the cervix; that the tears here present indicate progressive dilators were not used. Dr. Long admitted using a type of dilator which Dr. Carr testified was not the proper or approved type. Dr. Carr also testified that, according to approved practice, a therapeutic abortion is performed in a hospital because, among other things, an oxygen tank and carbon dioxide are available for emergencies. These emergency facilities were not present at the Haight street flat of appellant. Dr. Carr also testified that the tearing and mutilation and puncturing of the cervix, described by him, is a painful and shocking procedure, and would produce shock in the entire body, and that deceased died from shock; that it is the usual custom and practice of doctors to give a general anesthesia when performing an abortion, for the reason that this reduces shock; that with "the mutilation and the perforation one sees here, a rather deep anesthesia would be required to reduce the pain". Dr. Long testified he did not use a general anesthesia. There was other medical testimony that if

a person possessed the symptoms of a decompensating heart testified to by Dr. Long, that approved practice, before performing the abortion, would be to send the patient to a heart specialist and to hospitalize her for some time to build up her heart so it could stand the abortion; that the type of local anesthetic used by appellant would not render the patient immune from pain.

Other testimony could be referred to from which the jury could have inferred that appellant did not exercise that care and circumspection required in such cases. The testimony recited is sufficient to support the manslaughter verdict.

The next contention of appellant is that the trial court committed error in the giving of certain instructions. With this contention we agree.

On the question of reasonable doubt the trial court instructed the jury as follows:

"*If you find from the evidence beyond a reasonable doubt that the defendant Claude C. Long performed or attempted to perform an operation* upon the person of the deceased for the purpose of delivering an unborn child *and that the operation or attempted operation was performed with due caution and circumspection,* and if you believe from all the evidence that the operation was necessary to preserve the life of the decedent and that death resulted from such operation, *you shall nevertheless find the defendant not guilty;* but, on the other hand, if you believe beyond a reasonable doubt that due caution and circumspection were

not exercised, and if you believe that the operation was not necessary to preserve the life of Genevieve Argan-bright and that death resulted from such operation, then it is your duty to bring in a verdict of guilty." (Italics ours.)

The first part of this instruction was highly misleading. The jury was there told that they should find the appellant *not* guilty if they found "from the evidence beyond a reasonable doubt" that Long performed the operation "with due caution and circumspection", and that the operation "was necessary to preserve the life of the decedent". The necessary inference is that before they could acquit, the jury must find that appellant had established his defense beyond a reasonable doubt. The verdict of guilty of manslaughter implies that the jury found that the operation was performed without due caution and circumspection. On this issue the evidence of the prosecution was sufficient, as pointed out above, to sustain the verdict, but it was not by any means uncontradicted. There is substantial evidence, not only of appellant himself, but of several of his medical witnesses, that due caution and circumspection were employed, and at least one medical prosecution witness, Dr. Leland, testified that his physical examination after death disclosed no lack of skillfulness in the performance of the operation. Medical witnesses testified that, although they would always perform such an operation in a hospital, it was in fact a minor operation, and could easily be performed in an office; that the reason for going to a hospital was to protect themselves against a criminal charge of un-

lawfully performing an abortion. The method and the instruments used by Long were approved by several competent and qualified doctors. Under such circumstances, to instruct the jury that to acquit, the use of due caution and circumspection should be proved beyond a reasonable doubt, was error of a most prejudicial nature. It was not cured by the last portion of the instruction which correctly states that they should find defendant guilty if they believed beyond a reasonable doubt that lack of due caution and circumspection were proved, nor was it cured by the other general instructions on the presumption of innocence and instructions to the effect that the defendant's guilt must be shown beyond a reasonable doubt. The two statements of the law contained in the challenged instruction were highly misleading, and the first part of the instruction is in conflict with other instructions. While proper instructions told the jury that they should not convict unless guilt was shown beyond a reasonable doubt, on the specific issue of whether due caution and circumspection were used, the jury was told that they should acquit if they believed beyond a reasonable doubt that due caution and circumspection were used.

It is no answer to state, as does the respondent, that the instruction is correct as far as it goes, but that it does not go far enough—that is, it is correct in stating that under the circumstances set forth in the challenged instruction the jury should acquit, but that it is faulty only in that it "does not give the appellant the benefit of a lesser degree of proof to which he is entitled, to-wit, that there must also be a verdict of not

guilty of manslaughter if the evidence merely created a reasonable doubt as to the matters which the prosecution must prove", and that this deficiency was corrected by the other instructions above mentioned. The only reasonable and fair interpretation that can be placed on the challenged instruction is that the jury was told, not in general language but in specific language, that on the only issue involved on the manslaughter charge, to acquit, they must find due caution and circumspection beyond a reasonable doubt, and the obvious inference is that the burden is on the defendant to show this. In a case such as this, where, so far as manslaughter is concerned, the basic issue was the use or lack of due caution and circumspection, and where the burden on that issue is obviously on the People, and where the evidence on the issue was highly conflicting, to give the jury the challenged instruction, obviously was prejudicial and constitutes reversible error.

That the jury was confused by the instruction is indicated by what happened after they were first instructed. Some six hours after the jury retired to deliberate, they returned to the courtroom. The foreman stated that the jury desired those instructions dealing with whether or not the abortion "was legal or illegal" to be read to them. Another juror stated that was not what he wanted, he "wanted for you to read all the instructions that had to do with towards the latter part of your instructions, when you said if you find that an abortion was committed in order to save the life of the deceased, then you vote not guilty

* * *" Another juror stated: "There was just a dispute about that." When the judge suggested it might be better to read the instructions in the morning, a juror stated that they had better be read that night; that "not only for my own sake but I feel that for everybody's benefit it would be a help to have them and be able to answer these questions honestly". The judge then read three instructions. The first and third instructions dealt with only the murder phase of the case. In them the jury was told that before they could find the defendant guilty they must find beyond a reasonable doubt that the operation was not necessary to preserve life. The second instruction then read to the jury was the instruction now challenged. This was the only instruction then read to the jury dealing with manslaughter, and in it they were told to acquit the defendant if they found beyond a reasonable doubt that defendant exercised due caution and circumspection. When the trial judge had finished reading the instructions, the jurors stated, in response to an inquiry of the court, that "Yes, yes, those are just the ones". The judge then asked the jury if they desired the instructions to be reread to them, and, upon receiving an affirmative answer, reread these three instructions. Under such circumstances it must be held that the giving of such a conflicting, confusing, contradictory, misleading and erroneous instruction on such a vital issue constituted reversible error.

Appellant also complains of an instruction on the weight to be given to expert testimony, pointing out that since his defense was almost entirely predicated

on expert testimony, such instruction was highly prejudicial. After properly giving, practically verbatim, the instruction on expert testimony contained in section 1127b of the Penal Code, which instruction provides in part that the jury may disregard any expert opinion if found by them to be unreasonable, the trial judge did not stop there, as the Penal Code section permits him to do, but went on to give several other instructions on the same subject. Among other things he told the jury that they could "regard the testimony of an expert as merely advisory, and you are instructed that you may disregard altogether the testimony of such expert, and you may form your own conclusions from all the evidence submitted to you". This last-quoted instruction goes considerably beyond the language of the Penal Code section. It contains almost identical language to that held to be erroneous in *Hirshfield v. Dana,* 193 Cal. 142, and to be reversible error in *Pearson v. Crabtree,* 70 Cal. App. 52. We can add nothing to what was said concerning this instruction in these two cases. Whatever may be the value of expert testimony in some cases, in this case the question of the presence or absence of due caution and circumspection, in the nature of things, could be largely proved or disproved only by expert testimony—it was the only means open to defendant in presenting his defense. The instruction told the jury not only that they might disregard any expert opinion as provided in section 1127b of the Penal Code, but, in effect, told them that they could form their own opinion on this subject.

The respondent argues that, even if it be admitted that the *Crabtree* case, supra, holds that the giving of such instruction is reversible error, in this case the giving of the instruction was not error because in this case there was no evidence of malpractice. It is in this connection that the concession above referred to is made that no issue of lack of due caution and circumspection was presented in this case. As already pointed out, the issue of lack of due caution and circumspection was directly presented. This instruction should not be given on the retrial.

For the foregoing reasons the judgment and order denying a new trial are, and each is, reversed, and the cause remanded for a new trial.

Peters, P. J.

We concur:
Ward, J.
Goodell, J. pro tem.

Filed November 29, 1939,
Walter S. Chisholm, Clerk.

Opinion on Rehearing of District Court of Appeal, First Appellate District

(96 Pac. (2d) 1021.)

BY THE COURT

The petition for a rehearing is denied.

On this petition the sole point urged is that one of the two instructions held to be erroneous and prejudicial was in fact an instruction offered in part by the appellant. The instruction in question is the one on reasonable doubt. The respondent relies on the well-settled rule that an appellant cannot complain of an erroneous instruction offered by himself. (8 Cal. Jur. p. 564, Sec. 564.) That is a salutary rule.

Aside from the fact that the attorney general raises this point for the first time on rehearing, and that, under well-settled rules of appellate practice, points so raised will not be considered, there are at least two reasons why a rehearing should not be granted in the present case.

In the first place, while it is true that the first half of the instruction on reasonable doubt was offered by appellant, the second half of the instruction was given by the Court of its own motion. The rule concerning invited error has no application where the trial Court modifies the proffered instruction. In such case the instruction becomes the instruction of the Court, and, if erroneous, is subject to the same criticism as if given without request. (8 Cal. Jur. p. 566, Sec. 564 and cases cited.) This last-stated rule has peculiar application

to the present case. In modifying the proffered instruction by adding the second half thereto, the Court accentuated the error contained in the first half. By giving the second half of the instruction, of its own motion, the trial Court obviously confused the jury and contradicted itself. In a case as close on the evidence as this one, the error was prejudicial.

In the second place, the giving of the erroneous instruction on reasonable doubt was not the only ground of reversal, as contended by the attorney general. The opinion holds that the giving of the erroneous instruction on expert testimony was also prejudicial. The giving of this instruction would alone call for a reversal.

For the foregoing reasons it is obvious that the petition for a rehearing should be denied.

It is so ordered.

Peters, P. J.

We concur:
Ward, J.
Goodell, J. pro tem.

Filed December 14, 1939,
Walter S. Chisholm, Clerk.

Due service and receipt of a copy of the within is hereby admitted

this.....day of September, 1940.

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Attorney General of the State of California,

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Deputy Attorney General of the State of California,

Attorneys for Respondent.